INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	6
Conclusion	11
Appendix A	12
Appendix B	18

CITATIONS

Cases:

Atherton v. *United States*, 176 F. 2d 835, certiorari denied, 338 U.S. 938	6
Brooks v. *United States*, 147 F. 2d 134, affirming 54 F. Supp. 995, certiorari denied, 324 U.S. 878	6, 10, 11
Dingman v. *United States*, 156 F. 2d 148, certiorari denied, 329 U.S. 730	6
Falbo v. *United States*, 320 U.S. 549	7
Gibson v. *United States*, 329 U.S. 338	7
Heflin v. *Sanford*, 142 F. 2d 798	7
Hopper v. *United States*, 142 F. 2d 181	7
Kramer v. *United States*, 147 F. 2d 756, certiorari denied, 324 U.S. 878	6
Penor v. *United States*, 167 F. 2d 553	7
Roodenko v. *United States*, 147 F. 2d 752, certiorari denied, 324 U.S. 860	6, 9, 11
United States v. *Blankenship*, 127 F. Supp. 760	7
United States v. *Copeland*, 126 F. Supp. 734	7-8
United States v. *Diercks* (E.D. Ill.)	7
United States v. *Emery*, 168 F. 2d 454	7
United States v. *Gormly*, 136 F. 2d 227, certiorari denied, 320 U.S. 753	7
United States v. *Gray*, No. 27820(2) (E.D. Mo.)	7
United States v. *Henderson* (S.D. Ill.)	7
United States v. *Hoepker*, 126 F. Supp. 118	7

Cases—Continued — Page

United States v. *Kinney*, 125 F. Supp. 322..... 7
United States v. *Klubnikin* (S.D. Cal.)..... 7
United States v. *Messerman*, 128 F. Supp. 759.... 7
United States v. *Mroz*, 136 F. 2d 221, dismissed pursuant to Rule 35, 320 U.S. 805..... 7
United States v. *Olvera* (S.D. Tex.)..... 7
United States v. *Pomorski*, 125 F. Supp. 68, affirmed, C.A. 6 ..... 7, 18
United States v. *Ransom* (N.D. Ill.)..... 7
United States v. *Reese* (N.D. Cal.)..... 7
United States v. *Smith*, 124 F. Supp. 406.....7, 10, 11
United States v. *Sparks*, No. IP-Cr. 30 (S.D. Ind.). 7
United States v. *Steinel*, 70 F. Supp. 966..... 10, 11
United States v. *Sutter*, 127 F. Supp. 109..... 7
United States v. *Thomas*, 124 F. Supp. 411..... 7
United States v. *Van Den Berg*, 139 F. 2d 654.... 7
United States v. *Wilkinson*, Cr. 34388 (N.D. Cal.; Apr. 19, 1955) 8
United States ex rel. Zucker v. *Osborne*, 147 F. 2d 135, affirming 54 F. Supp. 984, certiorari denied, 325 U.S. 881 6
Weightman v. *United States*, 142 F. 2d 188 ..... 7, 11
Wolfe v. *United States*, 149 F. 2d 391..... 7

Statutes and Regulations:

Universal Military Training and Service Act, 62 Stat. 604, 65 Stat. 75:
Section 1(c) (50 U.S.C. App. 451(c))..... 12
Section 6(j) (50 U.S.C. App. 456(j))..... 8, 12
Section 12(a) (50 U.S.C. App. 462(a))..... 13
Selective Service Regulations:
Section 1660.1 (32 C.F.R. § 1660.1)..... 14
Section 1660.20 (32 C.F.R. 1660.20)..... 15

Miscellaneous:

97 Cong. Rec. 6026-6027, 6260 10

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 719

JERRY ALLEN NILES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 11) is not yet reported. The opinion of the District Court denying a motion for judgment of acquittal (Pet. 12-15), incorporated by reference in the opinion of the Court of Appeals, is reported at 122 F. Supp. 382.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1955 (Pet. 16). The petition

for a writ of certiorari was filed on April 13, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 6(j) of the Universal Military Training and Service Act, requiring a conscientious objector to perform "such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate", a conscientious objector may refuse to perform institutional work for a county department of charities designated by the local board.

STATUTE AND REGULATIONS INVOLVED

The pertinent portions of the Universal Military Training and Service Act, and Regulations issued thereunder, are set forth in Appendix A, *infra,* pp. 12-17.

STATEMENT

Petitioner was convicted of refusal to comply with the order of a selective service board, in violation of 50 U.S.C. App. 462(a). He was sentenced to imprisonment for 18 months. (R. 11-12.) On appeal, the judgment was affirmed (R. 50).

Petitioner was classified as a conscientious objector on September 27, 1951 (R. 20). On October 20, 1952, he was sent a form of application for volunteer civilian work (Ex. pp. 81, 88).[1] He was

[1] The reference "Ex." is to Government Exhibit No. 1, comprising petitioner's selective service file (R. 18). The

also sent a form advising him of the requirement under the Selective Service Regulations that he specify to the board three types of civilian work which he could perform, the designation to be within the types of approved civilian work on file in the local board office, i.e. work at the Camarillo or Mendocino State hospitals (Ex. pp. 81, 83). Petitioner notified the board that he did not wish to volunteer (Ex. p. 82), and he returned the report form without filling in the blanks (Ex. p. 84).

On February 13, 1953, the local board, as the next step under the Regulations, sent a notice offering petitioner his choice of the following types of work contributing to the national health, safety or interest (Ex. p. 90):

> A. Institutional Helper—County of Los Angeles, Department of Charities—Salary $181 to $233 a month for a forty hour week.
>
> B. Psychiatric Technician Helper—Camarillo or Mendocino State Hospitals—Salary $200 a month for a forty hour week.
>
> C. Truck Driver, Truck Driver Helper, Building Maintenance Man, Salesman, Clerk, Repairman and Cashier—Goodwill Industries (projects approved at Stockton, Sacramento, San Francisco, Oakland, San Jose, Santa Ana, San Bernardino, or San Diego)—Salary from $125 to $150 a month for a forty hour week.

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page references are to the page designations enclosed in circles in the copy of the selective service record which has been lodged with the Clerk of this Court.

Petitioner returned the notice, rejecting the work (Ex. p. 90) and stating that his voluntary work as a Jehovah Witness was "the most charitable of all works", that the wages offered were less than half of what he was receiving as a lather in the building trade, and that his work as a Jehovah's Witness and as a lather contributed more to the national health, safety, and welfare than the work that was offered (Ex. pp. 91, 93).

Thereupon, the local board and a representative of the State Director arranged a meeting with petitioner. In advance of this meeting, petitioner wrote a five-page letter (March 30, 1953, Ex. pp. 97-102) in which he repeated the foregoing grounds for refusal and added a reiteration of his earlier, overruled claim that he should have been classified as a minister. He characterized the proffered work as "unsavory" and "insulting to any intelligent person, being occupations for indigents, 'skid-row bums' and mental incompetents" and argued that the benefit of the work, if any, would be to the State of California and that what was involved was "a wearing-away process devised to shake a person's faith in his God and in himself" (Ex. p. 100). He stated that he would "not be forced into any of these positions come what may" (Ex. p. 102).

At the meeting, petitioner again refused any and all work, upon substantially the same grounds, "salary first of all", and adding that his migraine headaches would not permit hospital work, and that while his then 30 hours per week as a lather

would not interfere with his activity as a Jehovah's Witness, a 40 hour work week would do so (Ex. pp. 104-105).

On June 17, 1953, petitioner was sent an Order to Report for Civilian Work, designating the Los Angeles County Department of Charities as the agency for which he was to work (Ex. p. 140). He requested an extension of time to August 12 on the ground that he wished to attend "an international convention of Christian people in New York City" (Ex. p. 150). The request was denied and petitioner replied with a two-page typewritten letter "refus[ing] to accept the unconstitutional, unsavory occupation", reasserting his claim that the work was a measure to chastise conscientious objection and that he should have been classified as a minister, and stating that he would refuse work in his home city as well (Ex. pp. 153-154). Petitioner failed to report at the time and place specified (Ex. p. 159). After receiving a further order to report on September 4, 1953, for institutional work at the Los Angeles County Department of Charities (Ex. p. 161), he again refused to comply, this time adding to the previous reasons the assertion that he was the sole support of his mother and father (Ex. p. 172).[1a]

At the trial before the District Judge without a jury, the facts were stipulated (R. 18-23). Petitioner's contentions were directed solely to the

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[1a] Petitioner did not claim dependency of his parents in his Classification Questionnaire, Sept. 26, 1950 (Ex. p. 9).

lawfulness of the requirement that as a conscientious objector he perform work for a non-federal government agency. The District Court rejected the contention, relying upon the decisions that have upheld the constitutionality of selective service legislation and work requirements on the part of conscientious objectors, and pointing out that war powers and national defense are not restricted to matters of arms alone (Pet. 14-15). The Court of Appeals affirmed, *per curiam*, upon the reasons stated by the district court (R. 49, Pet. 11).

ARGUMENT

While petitioner contends that Congress did not, and constitutionally could not, authorize Selective Service boards to require conscientious objectors to work for non-federal governmental agencies, his refusal to work for a county agency is based upon the same broad claims of involuntary servitude and deprivation of liberty that were repeatedly raised with respect to the work provisions of the predecessor Selective Training and Service Act of 1940 and as repeatedly rejected by the various courts of appeals.[2] The Court of Appeals below,

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[2] *Atherton* v. *United States*, 176 F. 2d 835, 840-842 (C.A. 9), certiorari denied, 338 U.S. 938; *Dingman* v. *United States*, 156 F. 2d 148, 149-150 (C.A. 9), certiorari denied, 329 U.S. 730; *United States ex rel. Zucker* v. *Osborne*, 147 F. 2d 135 (C.A. 2), affirming 54 F. Supp. 984, 987-988, certiorari denied, 325 U.S. 881; *Kramer* v. *United States*, 147 F. 2d 756, 759-761 (C.A. 6), certiorari denied, 324 U.S. 878; *Brooks* v. *United States*, 147 F. 2d 134 (C.A. 2), affirming 54 F. Supp. 995, certiorari denied, 324 U.S. 878; *Roodenko* v. *United States*, 147 F. 2d 752, 753-754 (C.A. 10), certiorari denied, 324 U.S. 860;

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in upholding petitioner's assignment to work for a county department of charities, adds its authority to a number of similar holdings of district courts.[3]

United States v. *Gormly*, 136 F. 2d 227, 228-229 (C.A. 7), certiorari denied, 320 U.S. 753; *United States* v. *Mroz*, 136 F. 2d 221, 223-225 (C.A. 7), dismissed pursuant to Rule 35, 320 U.S. 805; *United States* v. *Emery*, 168 F. 2d 454, 456 (C.A. 2); *Penor* v. *United States*, 167 F. 2d 553 (C.A. 9); *Wolfe* v. *United States*, 149 F. 2d 391, 393 (C.A. 6); *Heflin* v. *Sanford*, 142 F. 2d 798 (C.A. 5); *Weightman* v. *United States*, 142 F. 2d 188, 190-192 (C.A. 1); *Hopper* v. *United States*, 142 F. 2d 181, 186 (C.A. 9); *United States* v. *Van Den Berg*, 139 F. 2d 654, 656 (C.A. 7); and note the assumption of the validity of the work requirement, in *Gibson* v. *United States*, 329 U.S. 338, 358; *Falbo* v. *United States*, 320 U.S. 549.

[3] *United States* v. *Messerman*, 128 F. Supp. 759, 763-764 (M.D. Pa.), work at a state hospital; *United States* v. *Blankenship*, 127 F. Supp. 760, 763 (S.D. W.Va.), state hospital; *United States* v. *Sutter*, 127 F. Supp. 109, 117-119 (S.D. Cal.), Los Angeles County Department of Charities; *United States* v. *Hoepker*, 126 F. Supp. 118, 121 (E.D. Ill.), state hospital (appeal pending); *United States* v. *Kinney*, 125 F. Supp. 322, 324 (E.D. Ill.), state hospital; *United States* v. *Pomorski*, 125 F. Supp. 68, 72-74 (W.D. Mich.), affirmed, C.A. 6 (see Appendix B, *infra*, pp. 18-20), state hospital; *United States* v. *Thomas*, 124 F. Supp. 411, 415-416 (E.D. Ill.), University of Chicago Clinics (appeal pending); *United States* v. *Smith*, 124 F. Supp. 406, 410-411 (E.D. Ill.), state hospital (appeal pending). Appeals are also pending in the following unreported cases: *United States* v. *Klubnikin* (S.D. Cal.), Los Angeles County Department of Charities; *United States* v. *Diercks* (E.D. Ill.), state hospital; *United States* v. *Henderson* (S.D. Ill.), state hospital; *United States* v. *Olvera* (S.D. Tex.), Board of State Hospitals; *United States* v. *Reese* (N.D. Cal.), Los Angeles County Department of Charities; *United States* v. *Ransom* (N.D. Ill.), state hospital. And see *United States* v. *Gray*, No. 27820(2) (E.D. Mo.), Alexian Brothers Hospital, non-profit organization primarily engaged in charitable activity for general public. Cf. holdings of orders invalid in *United States* v. *Sparks*, No. IP-Cr. 30 (S.D. Ind.), Methodist Hospital, on the ground that assignment to work under direction of a religious group other than that of the registrant's affiliation was improper; *United*

On April 28, 1955, in an opinion which is set forth as Appendix B to this brief (*infra*, pp. 18-20) the Court of Appeals for the Sixth Circuit has upheld the assignment of a conscientious objector to work in a State hospital, and rejected the contention which is urged here.

Petitioner concedes that Congress "has the right to designate some sort of federal work for performance by conscientious objectors" (Pet. 7). However, he contends that by the use of the word "national" in the phrase "civilian work contributing to the maintenance of the national health, safety, or interest" in Section 6(j) of the Act, conscientious objectors who have been exempted from both combatant and non-combatant service may only be required to perform alternative civilian work for direct agencies of the Federal government (as distinguished from state, county and local government agencies) (Pet. 6). Section 6(j) shows on its face that the words "*national* health, safety, or interest" describe only the ultimate result or effect of the work which may be required of conscientious objectors. The phrase "civilian employment" is the only statutory characterization of the employment relationships in which such work may be required. Nothing in the Act even suggests that conscientious objectors may not be required to perform for state, county and city

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States v. *Copeland*, 126 F. Supp. 734 (D. Conn.), Goodwill Industries, Inc. (private employment). But in *United States* v. *Wilkinson*, Cr. 34388 (N.D. Cal.; Apr. 19, 1955) the court upheld an assignment to work with Goodwill Industries.

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agencies and institutions work which clearly contributes to the "national health, safety, or interest." As stated in *Roodenko* v. *United States,* 147 F. 2d 752, 755 (C.A. 10), certiorari denied, 324 U.S. 860:

> * * * It is contended that it is a local reclamation water storage and irrigation project of no national importance having no connection with the war effort. The proper maintenance of agriculture, civilian business, transportation, sanitation, health, and many other civilian activities are as essential to the successful prosecution of the war and as much a part of the war effort as the production of munitions of war and the arming and equipping of the military forces. The Act places the determination of what projects are of national importance with the President. Roodenko has no standing to challenge the exercise of this discretion by the President.

Both in his petition (p. 6) and in his supplemental brief, petitioner contends that since the work required of conscientious objectors under Section 5(g) of the 1940 Act was performed in camps under federal control, it must be assumed that Congress understood and intended that work required of conscientious objectors under the present Act should be performed only for Federal agencies. To the contrary, the present Selective Service regulations omit any provision for work camps because of Congressional opinion, expressed

during the debates on the present Act, that there would not be a sufficient number of conscientious objectors to warrant the expense of establishing a work camp system. 97 Cong. Rec. 6027. Nothing in this context of legislative opinion suggests a purpose to restrict such required work to Federal employment.

The validity of the work requirement, whether under federal, state or local direction, becomes evident when considered in the light of the reasons which have led the courts to sustain such requirements generally. It has been recognized that the morale of those in military service will obviously be lowered by allowing conscientious objectors not only full freedom from the dangers and confinement of military activities, but also substantial advantages for economic improvement over those in their age group in military service who cannot offer employers or customers a similar guarantee of uninterrupted availability. 97 Cong. Rec. 6026-6027, 6260; *Brooks* v. *United States*, 147 F. 2d 134 (C.A. 2), certiorari denied, 324 U.S. 878; *United States* v. *Smith*, 124 F. Supp. 406, 410 (E.D. Ill.); *United States* v. *Steinel*, 70 F. Supp. 966, 968 (D. Conn.). Moreover, it must be recognized that since exemption depends heavily upon the registrant's own assertion of inner beliefs, an exemption without further responsibility of any kind on the part of the registrant tends sharply to increase the presentation of false claims of conscientious objection. *Brooks* v. *United States*, 147 F. 2d 134 (C.A. 2), affirming 54 F. Supp. 995, 997, certiorari denied,

324 U.S. 878; *Weightman* v. *United States,* 142 F. 2d 188, 191-192 (C.A. 1); *United States* v. *Steinel,* 70 F. Supp. 966, 968 (D. Conn.). And not even in peacetime is it possible to ignore the contribution to the manpower pool for military service when persons of the younger age-group are channelled into work for the national benefit, thereby releasing at least some manpower from that area. *Brooks* v. *United States,* 147 F. 2d 134 (C.A. 2), affirming 54 F. Supp. 995, 997, certiorari denied, 324 U.S. 878; *Roodenko* v. *United States,* 147 F. 2d 752, 755 (C.A. 10), certiorari denied, 324 U.S. 860; *United States* v. *Smith,* 124 F. Supp. 406, 410 (E.D. Ill.); *United States* v. *Steinel,* 70 F. Supp. 966, 968 (D. Conn.).

CONCLUSION

The decision below is correct and there is no conflict of decision in the courts of appeals. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

APPENDIX A

Statute and Regulations Involved

Section 1(c) of the Universal Military Training and Service Act 62 Stat. 604 (50 U.S.C. App. 451(c)):

> The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy.

Section 6(j) of the Act 62 Stat. 604, 65 Stat. 75 (50 U.S.C. App. 456(j)):

> * * * Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, * * * if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of

section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * * The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that * * * if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. * * *

Section 12(a) of the Act, 62 Stat. 604 (50 U.S.C. App. 462(a)):

* * * Any * * * person who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more

than $10,000, or by both such fine and imprisonment * * *.

Section 1660.1 of the Selective Service Regulations (32 C.F.R. § 1660.1):

Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory, or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

(2) Employment by a nonprofit organization, association, or corporation which is primarily engaged either in a charitable activity conducted for the benefit of the general public or in carrying out a program for the improvement of the public health or welfare, including educational and scientific activities in support thereof, when such activity or program is not principally for the benefit of the members of such organization, association, or corporation, or for increasing the membership thereof.

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(b) Except as provided in paragraph (a) (2) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O.

Section 1660.20 of the Selective Service Regulations (32 C.F.R. § 1660.20):

Determination of Type of Civilian Work to be Performed and Order by the Local Board to Perform Such Work.—(a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not

been classified in Class I-O, unless he has volunteered for such work.

(b) If the registrant fails to submit to the local board types of work which he offers to perform, or if the local board finds that none of the types of work submitted by the registrant is appropriate, the local board shall submit to the registrant by letter three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate for the registrant to perform in lieu of induction. The registrant, within ten days after such letter is mailed to him by the local board, shall file with the board a statement that he either offers to perform one of the types of work submitted by the board, or that he does not offer to perform any of such types of work. If the registrant offers to perform any one of the three types of work, he shall be ordered by the local board to perform such work in lieu of induction, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(c) If the local board and the registrant are unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the State Director of Selective Service for the State in which the local board is located, or the representative of such

State Director, appointed by him for the purpose, shall meet with the local board and the registrant and offer his assistance in reaching an agreement. The local board shall mail to the registrant a notice of the time and place of this meeting at least 10 days before the date of the meeting. If agreement is reached at this meeting, the registrant shall be ordered by the local board to perform work in lieu of induction in accordance with such agreement, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

(d) If, after the meeting referred to in paragraph (c) of this section, the local board and the registrant are still unable to agree upon a type of civilian work which should be performed by the registrant in lieu of induction, the local board, with the approval of the Director of Selective Service, shall order the registrant to report for civilian work contributing to the maintenance of the national health, safety, or interest as defined in section 1660.1 which it deems appropriate, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work.

APPENDIX B

No. 12337

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

THOMAS WALTER POMORSKI, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Decided April 28, 1955

Appeal from the District Court of the United States for the Western District of Michigan, Southern Division.

Before SIMONS, Chief Judge, MCALLISTER and STEWART, Circuit Judges.

PER CURIAM. Appellant, classified under the Universal Military Training and Service Act (50 U.S.C. App. Sections 451-470) in Class I-O as a conscientious objector, was convicted in the district court of violating the Act in failing to report for work at the Northville State Hospital in Michigan as ordered by his local draft board. Section 456(j) of the Act provides in part that if a conscientious objector is found to be conscientiously opposed to participation in noncombatant service with the Armed Forces, he shall, in lieu of induction into the Armed Forces "be ordered by his local board, subject to such regulations as the

President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate. . . ."

Section 1660.1 of the Selective Service Regulations, promulgated by Presidential Executive Order, lists the types of employment which may be considered as appropriate to be performed under the foregoing statutory provision as "civilian work contributing to the maintenance of the national health, safety, or interest." It includes "employment by the United States Government, or by a State, Territory or Possession of the United States, or by a political subdivision thereof, or by the District of Columbia."

Appellant argues that the order to perform work in a *state* institution, and the regulations permitting such an order, are in conflict with the statute because such work does not contribute to the "*national* health, safety, or interest." He alternatively argues that if the statute be interpreted to permit the local board to order him to perform civilian services for a state institution, it violates the Thirteenth and Fifth Amendments to the Constitution.

The record shows that the Northville State Hospital is a mental hospital, caring for members of the public in need of its services, including veterans whose cost of hospitalization is in part defrayed by the national government through the Veterans Administration.

We think the appellant's contentions are with-

out merit. The care and restoration of those in impaired mental health, whether carried on by a local, state or national institution, obviously contributes to the national interest. The regulations and order are thus clearly within the language of the statute. Moreover, the statute as so interpreted is clearly Constitutional. It is not the Constitution but Congressional policy which relieves the conscientious objector from the duty of bearing arms. *United States* v. *Macintosh,* 283 U.S. 605, 623, 624 (1931). The appellant, at his own request, was so classified as to be accorded the privilege of civilian work in lieu of the duty to enter the Armed Forces. There can be no Constitutional challenge of the validity of an Act which gave appellant conditional exemption from a service which he could Constitutionally be compelled to perform. *Roodenko* v. *United States,* 147 F. (2d) 752 (10 Cir., 1944), cert. den. 324 U.S. 860 (1945). See *United States* v. *Niles,* 122 F. Supp. 382 (N.D. Cal., 1954); *United States* v. *Smith,* 124 F. Supp. 406 (E.D. Ill., 1954).

The judgment of the district court is affirmed.

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